In the Supreme Court
of the United States

OCTOBER TERM, 1943

VANCOUVER BOOK & STATIONERY CO., INC., a Corporation,

Petitioner,

vs.

L. C. SMITH & CORONA TYPEWRITERS, INC., a Corporation; J. K. GILL CO., a Corporation; PACIFIC STATIONERY & PRINTING CO., an Oregon Corporation; and THE ADJUSTMENT BUREAU OF THE PORTLAND ASSOCIATION OF CREDIT MEN, an Oregon Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the United States Circuit Court of Appeals for the Ninth Circuit.

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STEVENS-NESS LAW PUB. CO., PORTLAND

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CONSTITUTION AND STATUTES

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SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner is a small Washington corporation and had been engaged in the stationery, book and typewriter biusness in the City of Vancouver, Washington.

Respondents are as follows:

The Adjustment Bureau of the Portland Association of Credit Men is an Oregon corporation, having as one of its principal functions the liquidation of businesses. The J. K. Gill Co. is an Oregon corporation located at Portland, Oregon, and is engaged in the wholesale and retail merchandise business. L. C. Smith and Corona Typewriters, Inc., is a New York corporation, and has a branch office in Portland, Oregon. Pacific Stationery and Printing Co. is an Oregon corporation located at Portland, Oregon.

Petitioner commenced this action against respondents in the District Court of the United States for the District of Oregon. Two of the causes herein are in the nature of malicious prosecution for the wrongful bringing of two separate involuntary bankruptcy proceedings against petitioner. Some of the salient facts in the case are as follows:

Respondents executed an involuntary petition in bankruptcy in Portland, Oregon and filed it in the District Court of the United States for the Western District, Southern Division of Washington. The bankruptcy petition was based upon Sec. 3. a. (6) of Chapter III of the Bankruptcy Act, which states:

> "Acts of bankruptcy by a person shall consist of his having . . . (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

In that petition respondents alleged as the sole act comprising the commission of an act of bankruptcy, the execution of the following writing (Tr. 16):

Vancouver, Wn.,
Sept. 13, 1939

To the Creditors:

This is to advise that this firm is no longer able to continue its business. It is unable to pay its debts and is willing to be adjudged a bankrupt.

Vancouver Book & Stationery Co., Inc.
by W. P. Phillips,
Secretary and Manager.

Pl. pre-trial and trial
Exhibit 20

Phillips had been manager of petitioner, Joseph A. Hill, principal investor and stockholder, having engaged him as such. Prior to the execution of the so-called admission Hill had discharged Phillips, (Tr. 445) who thereupon went to respondents. Their attorney prepared the writing and Phillips then and there signed it without notifying Hill or calling a meeting of directors or stockholders, either de jure or de facto.

Petitioner contested the bankruptcy and on the eve of trial, the U. S. District Court for the Western District, Southern Division in Washington, upon motion of respondents, dismissed the petition without prejudice. (Tr. 17)

In the meantime respondents filed a new or second involuntary petition in bankruptcy (Tr. 17). In this second petition respondents again alleged that petitioner had committed an act of bankruptcy under Sec. 3. a. (6) of Chapter III of the Bankruptcy Act by Phillips signing that so-called admission. Petitioner again contested and at the trial respondents abandoned this same alleged cause.

In that second bankruptcy petition respondents alleged that petitioner also committed two acts of bankruptcy under Sec. 3. a. (3) of Chapter III of the Bankruptcy Act, which says in part:

> "Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, *while insolvent*, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien . . ."

On the two alleged causes under this section (3) trial was had before a jury, which held that when the attachment and levy were made petitioner was *not insolvent*. The court thereafter dismissed the second involuntary petition. (Tr. 18)

When the two involuntary bankruptcy petitions were filed there were attachments and levies against the major portion of the stock and fixtures of petitioner for claims on which there was about $1000.00. However, no attachment or levy had been made against the accounts receivable and other personal property comprising a considerable portion of petitioner's assets. (Tr. 93, 310-326)

Under this state of facts and in anticipation of an execution sale respondents had filed a petition for the appointment of a receiver in the second bankruptcy proceeding (Ex. 14). Respondents presented this petition ex parte and without any notice to petitioner and in violation of Rule 65 (a) and (b) of the Federal Rules of Civil Procedure and obtained an order appointing a receiver and restraining "all persons whomsoever . . . from in any wise interfering with any of the assets of petitioner."

The receiver qualified by filing an approved surety bond. (Ex. 14) Petitioner offered proof that the attachments and levies that were placed against stock and fixtures of petitioner were, by consent, accomplished through a keepership under which petitioner's business was kept open and operating until shortly before the filing of the first bankruptcy petition; and that respondents induced and procured the Washington State Tax Commission to close petitioner's business under its $89.21 lien (it had claimed a $300.00 lien). The district court denied petitioners the right to present the evidence offered (Tr. 277, 278); and although the receiver took no other affirmative action, he did report to the court that an inventory showed stock and fixtures of the value of $3088.44, and he petitioned the court for an order to sell; but, upon hearing, the court denied the petition. (Ex. 14)

The property of petitioner was thus tied up by the receivership for about six months, during which time rent and keeper's fees accumulated, petitioner's lease

was cancelled, and its business and good will were ruined. There being no hope of sale of petitioner's stock at retail in the ordinary course of business, upon respondents agreeing to a dismissal of the receivership, petitioner agreed to a forced sale of the stock and fixtures, the proceeds to be held to abide the trial on the second involuntary bankruptcy petition. Only $1277.00 was obtained from the forced sale, all of which went towards keeper's fees, rent, etc. and petitioner realized nothing therefrom.

Many months later the trial occurred and dismissal followed. Action was thereafter brought in the Federal District Court of Oregon, the State where the wrongful proceedings were initiated for consummation in the State of Washington. Petitioner timely demanded a jury trial. The records of the proceedings in the bankruptcy cases were introduced by petitioner to make a prima facie case of malicious prosecution. (Exhibits 12 and 14)

Petitioner claimed a number of causes of action against respondents but we shall here mention only two. One was for the wrongful filing of the first bankruptcy proceeding, i. e., the one based solely upon the so-called admission in writing by Phillips. It was undisputed that Phillips had been discharged by petitioner when he signed the admission (Tr. 445) and that the writing was prepared by respondents' attorney and signed then and there without a meeting of or authorization by the directors or stockholders (Tr.

70) and that this proceeding in bankruptcy was dismissed on motion of respondents (Tr. 16).

The second cause of action mentioned in the preceding paragraph is based upon the wrongful taking of the second involuntary bankruptcy proceedings, wherein three acts of bankruptcy were alleged. We have already covered the first cause, which was based on the Phillips "admission". The second and third causes in the second bankruptcy petition were based upon allegations that petitioner had failed to remove liens while allegedly insolvent. Petitioner made a prima facie case of want of probable cause by introducing the record of that proceeding, showing that the Federal District Court in Tacoma, Washington, entered a judgment of dismissal after the jury returned a verdict that petitioner was not insolvent when the liens were obtained. (Tr. 18)

But petitioner augmented its prima facie case by further proof of solvency. The undisputed testimony was that petitioner had assets of the fair value of $10,312.00 and liabilities of $3500.00 when the liens were obtained and the petitions filed. (Tr. 326)

These are some of the undisputed salient facts that made up the record when the trial court cut off the case and directed a verdict for the respondents. (Tr. 472) Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit which affirmed the District Court on November 1, 1943. Its opinion appears on page 487 of the Transcript and is reported in 138 Fed. (2d) 635.

JURISDICTION OF THIS COURT

The jurisdictional statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. The District Court had jurisdiction because of the diversity of citizenship of the parties and the amount in controversy exceeded $3000.00. See 28 U.S.C.A. Sec. 41, (1) and (c). The Circuit Court of Appeals had jurisdiction under 28 U.S.C.A. Sec. 225 (a) First.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Since petitioner had not yet closed its case or put in all of its testimony at the time the District Court directed a verdict against it and since all of the undisputed facts presented in evidence showed that petitioner had at least two good causes of action against respondents, petitioner was denied the right of trial by jury and the rights guaranteed it under the Seventh and Fourteenth Amendments to the Constitution.

2. The District Court erred in denying petitioner the right to introduce evidence before the jury that tended to show malice (Tr. 287, 280) on the part of respondents and the Circuit Court of Appeals was in error in adding "insult to injury" by stating in its

opinion that "there was no affirmative showing of malice."

3. The Circuit Court of Appeals erred in that it applied as the definition of *insolvency* the law as it existed under the Bankruptcy Act of *1867* instead of the Act of *1898*. (See Remington on Bankruptcy, Vol. 4 A, 5th Ed., Sec. 1686.) Under the 1867 Act insolvency was interpreted to mean the inability to pay debts as they matured. Under the Act of 1898, which has been in effect ever since, and under the interpretation of that act by other Circuit Courts of Appeal and by this court, insolvency means exactly what the act says, to-wit:

> "Chapter I, Section 1. (19)—A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property . . . shall not at a fair valuation be sufficient in amount to pay his debts."

The only evidence concerning solvency of petitioner was the court's judgment of dismissal based upon the verdict of the jury that petitioner was solvent; and the further evidence adduced by petitioner that its assets, exclusive of the value of its lease, were worth $10,312.00 and its liabilities were $3,500.00. The lower court used as its measure of insolvency the financial stress of petitioner, declining sales, inability to pay its debts, etc. The confusion of the Circuit Court of Appeals becomes apparent when it refers to "the admission of insolvency" on line 12 of page 492 of the transcript, which is the

statement in writing by Phillips "acknowledging the Stationery Company's inability to pay its debts . . ." See lines 27 and 28 on page 488 of the Transcript.

4. The lower courts erred in refusing to follow and give effect to the law as laid down by this court in Mueller vs. Nugent, 184 U.S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 Law Ed. 405, that "the filing of the petition (in bankruptcy) is a caveat to all the world and *in effect an attachment and injunction.*" This is the law generally and its application should not be averted because part of petitioner's assets were already attached.

5. The lower courts erred in refusing to follow the general rule of law and the one laid down by other Circuit Courts of Appeal that the appointment of a receiver in a bankruptcy proceeding under an order restraining all other persons from interfering with the assets of alleged bankrupt, coupled with the qualification of the receiver, effects a sequestration of the alleged bankrupt's property. The fact that a part of petitioner's assets, which, according to the inventory report of the receiver was worth $3088.44, was held under valid prior liens or attachments for about $1000.00 does not alter the legal or practical effect of the appointment and qualification. In this case the receiver made a report of inventory and petitioned for authority to sell. Moreover there were some physical assets as well as all the accounts receivable which had not been attached.

6. The lower courts erred in refusing to give effect to and follow the law as laid down by other Circuit Courts of Appeal, which hold that an admission in writing by a corporation that it is unable to pay its debts and is willing to be adjudged a bankrupt must be made or authorized by its directors or stockholders. The fact was uncontroverted that the admission signed by Phillips was not executed pursuant to a meeting of or authorization by the stockholders or directors. Phillips had been discharged by Hill, who had originally hired him. This was the unqualified state of the record when the lower courts held that this writing constituted probable cause for filing the two bankruptcy petitions against petitioners. We have already pointed out that such admission, if valid otherwise, could have no bearing on the issue of solvency as defined by the Bankruptcy Act ever since 1898. But it also gave no good cause for the filing of the first petition and the first alleged cause in the second petition. All one needs to do is to apply the law to the facts. Respondents did that and both times abandoned attempts to present a case on that issue. It was clear error for the lower courts to fail to apply the law to such an undisputed state of facts.

7. The Circuit Court of Appeals decided, contrary to local law in both Oregon and Washington, and contrary to the general law and against the great weight of authority, that a seizure of property must take place in order to give rise to a cause of action for malicious prosecution for the wrongful institution

of involuntary bankruptcy proceedings. In so holding the Circuit Court of Appeals confused the rights of an alleged bankrupt on a bond under Section 69 a. and b. of the Bankruptcy Act, and for an action for malicious prosecution. That distinction is noted in In re Ito Terusaki, 238 Fed. 934, a case decided in the District Court of the State of Washington. After holding that as against the bondsman there must be proof of actual seizure, the Court said on page 936:

> "If the bankrupt has been damaged, he has a remedy; but it is not in this proceeding against the bondsmen."
>
> "There is no liability for filing a petition in bankruptcy, except for the usual costs, unless the petitioners acted without probable cause and maliciously, in which case the remedy is an action in the nature of a suit for malicious prosecution."

PRAYER FOR WRIT

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its deview and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10215 Vancouver Book & Stationery Co., Inc., a corporation, Appellant, vs. L. C. Smith & Corona Type-

writers, Inc., a corporation; J. K. Gill Co., a corporation; Pacific Stationery & Printing Co., an Oregon corporation; and The Adjustment Bureau of the Portland Association of Credit Men, an Oregon corporation, Appellees; and that the judgment of the District Court of the United States for the District Court of Oregon that was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, be set aside and that petitioner be granted a new trial before a jury, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Vancouver Book & Stationery Co., Inc.,
a corporation, Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

Petitioner was deprived of his constitutional right of trial by jury.

U. S. Constitution, 7th Amendment.
U. S. Constitution, 14th Amendment.

Jacob v. New York City, 315 U.S. 752, 86 Law Ed. 1166, 62 Sup. Ct .854.

Bailey, Adm. v. Central Vermont Ry., 319 U.S. 350, 87 Law Ed. 1030, 63 Sup. Ct. 1062.

QUOTING FROM AUTHORITIES

Jacob v. New York City, 315 U.S. 752, 86 Law Ed. 166, 62 Sup. Ct. 854:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of general jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Bailey, Adm. v. Central Vermont Ry., 319 U.S. 350, 63 Sup. Ct. 1062, Page 353:

> "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. Jones v. East Tennessee V. & G. R. Co., 128 U.S. 443, 445; Wash-

ington & Georgetown R. Co. v. McDade, 135 U.S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'"

SUMMARY

This court has wisely and justly reiterated and put into practice through recent decisions the essence of democracy in our judicial system—the genuine right of trial by jury. Steadily this right was being encroached upon by our courts and especially our Federal Courts. Many District Courts have taken the Rules of Procedure as set forth by this court as the "go signal" for assumption of arbitrary power and undue and unwarranted control in the trial and disposition of cases. In this case the trial court first ordered, against the objection of petitioner, that the trial before the jury would be confined to the issue of liability and damages would not be considered by that jury (Tr. 89, 90) Whether the trial court would then assume to fix the damages itself or arrange for another jury to fix the damages is not certain. At any rate there was no good reason for such arbitrary action assumed under the Rules. Then the trial court took the notion to confine the evidence to the issue of probable cause. (Tr. 432, 433, 456) A perusal of the record will show many other arbitrary assump-

tions by the trial court of undue powers—not rights—by the court. Only if the Supreme Court by practical decisions safeguards the democratic rights of the people—will democracy be effective in the judiciary. The irony of this case will be observed in the opinion of the Circuit Court of Appeals in affirming the District Court partly for the reason that petitioner failed to produce affirmative evidence of malice. That was not correct because some evidence did creep in that showed malice. But our heads were cut off on that issue when the District Court arbitrarily directed petitioner to confine its evidence to want of probable cause.

Moreover, it is bad enough when under disputed evidence the trial court usurps the function of the jury by construing it to suit its point of view and stating that there is no dispute. Here the trial court went further. It took the evidence adduced, clear and unqualified, showing want of probable cause on the issue of insolvency, and on the issue of whether the so-called admission was sufficient cause for filing the first bankruptcy petition and the first cause in the second petition, and, as a magician alone can do, stated that there was probable cause and cut off our right of trial by jury. Interestingly enough, the respondents understood their position a bit better. They knew they had neither good or probable or any cause at all on their first petition. That is why they attempted to fortify themselves by the filing of a second petition with new causes. That is why they took a

voluntary dismissal of the first petition before trial. That is why they abandoned that same cause at the trial on the second petition.

We urge upon the court the important fact that there was no controverting testimony under the law to the plain showing made of want of probable cause. For our sake in obtaining our rights in this case and for the maintenance of democracy in the functioning of our judicial system we look to you to review our case.

2.

It was error for the District Court to deny petitioner the right to introduce evidence of malice and for the Circuit Court of Appeals to ignore that fact and base its decision, as stated in its opinion (Tr. 492) partly upon the proposition that there was no affirmative showing of malice. This point has already been covered by the preceding summary.

3.

Chapter 1, Sec. 1 (19) of the Bankruptcy Act plainly defines insolvency. This court has affirmed the plain meaning of insolvency as defined by the act. Circuit Courts of Appeal have so applied that definition. In this case the Circuit Court of Appeals applied a contrary meaning directly opposite to the plain language of the act and the construction given that language by this court and other Circuit Courts of Appeal.

Title 11 U.S.C.A., Sec. 1, Note 10.

Title 11 U.S.C.A., Sec. 1, 1943 Cum. Ann. Pocket Part.

Chapter 1, Sec. 1 (19) of the Bankruptcy Act.

Remington on Bankruptcy, Vol. 4A, 5th Ed., Sec. 1686.

Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 45 Law Ed. 1171, 21 Sup. Ct. 906.

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 F. (2d) 564, 49 Am. B.R. 240 (C.C.A. 8th Cir.).

Lynn D. Laswell, Trustee v. Stein-Block Co., 93 Fed. (2d) 322, C.C.A. 5th Cir. 1937, 35 Am. B. R. 242.

QUOTING FROM AUTHORITIES

Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 45 Law Ed. 1171, 21 Sup. Ct. 906.

Quoting from 182 U.S. page 451:

> "At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that from by which payment may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors. The discussion need not be extended, the law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences not only to the debtor but to his creditors and to purchasers of his property."

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564, 49 Am. B. R. 240, C.C.A. 8th Cir. 1942.

Quoting from pages 565-6 of 127 Fed. (2d):

> "Under the provisions of the Bankruptcy Act here controlling [Bankruptcy Act, sec. 1 (15), Title 11 U.S.C.A.] one is insolvent 'whenever the aggregate of his property . . . shall not at a fair valuation, be sufficient in amount to pay his debts.'
>
> "Insolvency, under the act here involved, must be determined according to whether or not the aggregate of a person's property at a fair valuation is sufficient to pay his debts."

Lynn D. Laswell, Trustee v. Stein-Block Co., 93 Fed. (2d) 322, C.C.A. 5th Cir. 1937, 35 Am. B. R. 242.

Quoting from pages 322, 323 of 93 Fed. (2d):

> "In Carson, Pirie, Scott Co. v. Chicago Title & Trust Co., 182 U.S. 438 (451), 5 Am. B. R. 814, 45 L. Ed. 1171 (1178), it is pointed out that the Bankruptcy Act of 1898 has 'made its definition of insolvency, whatever the effect may be . . .'
>
> "Under the Act of 1898, a person is deemed insolvent when 'the aggregate of his property, . . . shall not, at a fair valuation, be sufficient in amount to pay his debts.' Bankruptcy Act, Sec. 1(15); 11 U.S.C.A., Sec. 1(15)."

Quoting from page 164 of Vol. 4A, Remington on Bankruptcy:

> "The definition ofinsolvency given in subdivision (15) of Sec. 1 of the Act of 1898 as originally enacted has not been amended. It is now found in subdivision (19) of Sec. 1, 11 U.S.C.A.,

> Sec. 1. The insolvency which must be established under Sec. 60 is the condition defined in subdivision (19) of Sec. 1. It involves the determination that the total of the provable debts owed by the bankrupt is greater than the aggregate of his property at a fair valuation, exclusive of any property he has concealed or transferred in fraud of creditors."

SUMMARY

That the District Court adopted the 1867 to 1898 and not the 1898 to present law defining insolvency is found in its statement on page 466 of the transcript. That the Circuit Court of Appeals failed to bring the District Court up to date on that proposition of law is apparent in its conclusion and its opinion. On page 488 of the transcript it says

> "On September 13 Phillips delivered to the Adjustment Bureau a statement in writing acknowledging the Stationery Company's liability to pay its debts and its willingness to be adjudged a bankrupt. Phillips signed the statement as secretary and manager."

In referring again to this statement (the only one there was) the Court referred to it (Tr. 492) as

> "the admission of insolvency."

We look to this court to correct the erroneous views and conclusions of the lower courts.

4.

The filing of an involuntary petition in bankruptcy

constitutes a caveat to all the world and in effect an attachment and injunction.

Mueller v. Nugent, 184 U.S. 1, 46 Law Ed. 405, 22 Sup. Ct. 269, 7 Am. B. R. 224.

SUMMARY

Here we beg to point out that it should make no difference that there may already be an attachment on assets of alleged bankrupt. That is almost always true. Businesses do recover from ordinary levies and attachments. They seldom survive an involuntary petition in bankruptcy. Can it be said in good reason that the fact that over $3000.00 in assets are attached for about $1000.00, gives just cause for stabbing the debtor with an involuntary petition? Moreover, in this case there were other assets, such as accounts receivable and neon sign and linoleum, etc. that were not attached.

5.

The appointment of a receiver and his qualification constitute a sequestration of the property involved. In the present case the receiver reported an inventory and petitioned to sell.

QUOTING FROM AUTHORITIES

45 Am. Jur. 127, Sec. 152.

53 C.J. 106.

W. W. Wilkinson vs. J. L. Walker, 2 Am. B. R. 743 (D. C. No. Dist. of Texas Sept. 1923).

Ross v. Stroh, 165 Fed. 628, 21 Am. B. R. 644 (C.C.A. 3d Cir.).

Gilbert's Collier on Bankruptcy, 4th ed., Sec. 52, p. 50.

45 Am. Jur. 127, Sec. 152:

"A receivership operates to give to the receiver the right to custody and possession of the property subject to the receivership, for the benefit of the party ultimately proving to be entitled thereto."

53 C. J. 106:

"The doctrine of relation back to the order of apointment, so as to place the property in custodia legis from that time, applies even though the receiver has not taken actual possession, or has refused to act . . ."

W. W. Wilkinson v. J. L. Walker, (U.S. D.C., No. Dist. of Texas, (Sept. 1923), Am. B.R. Vol. 2 N.S. p. 743, at p. 750:

"The order appointing a receiver of the bankrupt's entire estate, and directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, effects a sequestration of the bankrupt's estate. Ross v. Stroh (C.C.A. 3d Cir.) 21 Am. B.R. 644,

165 Fed. 628, 91 .CC.A. 616. The property of the bankrupt is *in custodia legis.*"

Gilbert's Collier on Bankruptcy (4th ed.) Sec. 53, p. 50:

"Effect of Appointment: An order appointing a general receiver of the bankrupt's entire estate, directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, effects a sequestration of the bankrupt's estate to such an extent as to prevent the acquisition of any new lien theeron."

6.

The power to act for a corporation in liquidating its assets through bankruptcy proceedings or by assignment for the benefit of creditors is vested in the board of directors. That was and is the law in the State of Washington. That is the law generally throughout the various states. In Oregon, however, the stockholders must duly authorize such an act. In this instance neither the stockholders or directors authorized the admission by Phillips.

Rudeback et al. v. Sanderson, 36 Am. B.R. 146 (C.C.A. 9th Cir., Nov. 15, 1915).

19 C.J.S., pages 119, 1120, 1121.

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564 (C.C.A. 8th Cir., April, 1942).

Vol. 1 Remington, 4th Ed., Sec. 176.

QUOTING FROM AUTHORITIES

Rudeback et al. v. Sanderson, 36 Am. B.R. 146 (C.C. A. 9th Cir., 1915).

Quoting from page 148 of 36 Am. B.R., which quotes Loveland on Bankruptcy (4th Ed.):

> "'It may be said generally that the president or other officer of a corporation has not the power on his own authority to execute a voluntary petition. . .'"

Vol. 1, Remington, 4th ed., Sec. 176, page 274:

> "Also, of course, an officer cannot by writing a letter in the name of a corporation bind the corporation to this act, unless expressly authorized to do so."

Arkansas Oil & Mining Co. v. Murray Tool & Supply Co., 127 Fed. (2d) 564 (C.C.A. 8th Cir., April, 1942):

> "But there is another fatal objection to this written admission. It does not appear to have been authorized either by the board of directors or by the stockholders. Such an admission can be made only by some corporate act, and an admission by an officer, whose power to bind the corporation by such admission is not shown, is insufficient."

SUMMARY

Neither the District Court or the Circuit Court of Appeals took cognizance of the law on this point. Respondents were aware of it or they would not have

abandoned the first petition and the first cause of action in the second. The Circuit Court of Appeals said in its opinion that the admission was signed by Phillips as secretary and manager and makes no mention of any authorization by the drectors or stockholders. Both lower courts ignored completely that Phillips had been discharged at the time he signed the statement. The law as quoted was the law in this ninth circuit for many years, the Rudebeck v. Sanderson case having been decided in 1915. That statement was obviously no proper basis for bringing the first bankruptcy proceeding. It has already been shown that it was no better basis for bringing the second.

7.

The filing of an involuntary petition in bankruptcy with malice and without probable cause gives rise to a cause of action in the nature of malicious prosecution. This is the law in the State of Washington as well as the State of Oregon and generally throughout the United States.

Sachs v. Weinstein (N.Y. App. Div.) 2 Am. B. R. (N.S.) 658, 208 App. Div. 360, 203 N.Y. Sup. 449.

34 Am. Jur., Sec. 17, p. 711.

38 C.J., page 391, Sec. 17.

Mueller v. Nugent, 184 U.S. 1, 7 Am. B.R. 224, 22 Sup. Ct. 269, 46 Law Ed. 405.

Stewart v. Sonneborn, 98 U.S. 187, 25 Law Ed. 116, 86 A.L.R. 219, Annotation.

Cooley on Torts, Vol. 1 (3d Ed.) p. 345.

Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218 (C.C. Mo.).

Gilbert's Collier on Bankruptcy, 4th Ed., Sec. 1114, .p 818.

Ito Terusak, 238 Fed. 934.

QUOTING FROM AUTHORITIES

Cooley on Torts, Vol. 1 (3d ed.), p. 345:

> "In some cases an action may be maintained for malicious prosecution of a civil suit, but the authorities are not entirely agreed what cases to embrace within the rule. A case of malicious institution of proceedings in bankruptcy in *undoubtedly one.* If these are instituted maliciously and without probable cause and terminate without adjudication of bankruptcy, an action will lie for damages sustained."

Wiliknson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218 (C.C. Mo.).

Page 219:

> "In my opinion, a bankruptcy proceeding cannot be said to be an ordinary civil suit. It is sui generis, and it is far reachng and drastic in its effects. Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally. . . . As the Supreme Court expresses it in Mueller v. Nugent, 184 U.S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:
>
> " 'The filing of the petition is a caveat to all the world, and in effect an attachment and injunction.' "

Gilbert's Collier on Bankruptcy, 4th Ed., Sec. 114, p. 818:

> "but where a bankruptcy proceeding is instituted without probable cause and with malicious intent, an action for malicious prosecution will lie. If malice exists and there is no rpobable cause such action will lie, even if neither the alleged bankrupt is served nor the property is seized by process."

National Surety Co. v. Page, 58 F. (2d) 145 (C.C.A. 4th Cir.).

Page 148:

> "Civil proceedings, other than actions, which from their nature are likely to injure reputation or credit, may furnish ground of an action for malicious prosecution. 38 C.J. 391. Thus, the institution of bankruptcy proceedings may furnish ground for the action. Stewart v. Sonneborn, 98 U.S. 187, 25 L. Ed. 116.

CONCLUSION

We have not undertaken in this brief to show all the errors of the lower courts in this case, not the least of which was the refusal of the trial court to allow petitioner to try the case on its theory of conspiracy to destroy petitioner's business with resultant acts that could have no other effect. We did not mention here the abortive injunction obtained ex parte in the State court. Many other errors appear in the records, the import of which indicate a lack of comprehension by the lower courts of the real purpose

of the Federal Rules of Civil Procedure and the genuine requirements of a jury trial as intended by our Constitution. We shall but conclude with the hope and prayer that in the interest of the best public policy in the administration of justice as well as the coinciding interest of petitioner, this court will give heed to our cry of wrong, and, upon finding the arbitrary injustice done us, will set down the true principles of law on the issues presented.

Respectfully submitted,

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